Supreme Court, U. S.
FILED
DEC 1 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

Nos. 76-459
and 76-476

COMMUNICATION WORKERS OF AMERICA, AN UNINCORPORATED LABOR ASSOCIATION,

Plaintiff-Appellant,

vs

STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, JAMES M. SHAFFER, EXECUTIVE DIRECTOR, STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, HENRY C. KIMBROUGH, IN HIS CAPACITY AS A MEMBER OF THE INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, ALBERT F. MANGAN, IN HIS CAPACITY AS A MEMBER OF THE INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, AND KENNETH C. RUSSELL IN HIS CAPACITY AS A MEMBER OF THE INDUSTRIAL COMMISSION OF COLORADO,

Defendants-Appellants

vs

WESTERN ELECTRIC COMPANY, INC., A NEW YORK CORPORATION AND THE MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY, A COLORADO CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE SUPREME COURT OF COLORADO

MOTION TO DISMISS OR AFFIRM

DAVID R. HANSEN
931 - 14th Street, Suite 1300
Denver, Colorado 80202

Attorney for Defendant - Appellee
The Mountain States Telephone and Telegraph Company

TABLE OF CONTENTS

Page

MOTION TO DISMISS OR TO AFFIRM 2

INTRODUCTORY STATEMENT OF THE CASE 2

SUPPLEMENTAL STATEMENT OF THE CASE 2

ARGUMENT IN SUPPORT OF GRANTING THE MOTION TO DISMISS OR TO AFFIRM 5

1. THE QUESTION OF COLORADO'S AUTHORITY TO REGULATE UNION SECURITY BY IMPOSING A "TWO ELECTION" PROCEDURE DOES NOT PRESENT AN ISSUE SUFFICIENTLY "RIPE" FOR REVIEW 5

2. THE APPEALS PRESENT NO SUBSTANTIAL FEDERAL QUESTION SINCE THIS COURT HAS PREVIOUSLY DETERMINED THAT §14(b) OF THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. §164(b), MAY BE APPLIED TO EMPLOYERS ENGAGED IN INDUSTRIES AFFECTING COMMERCE 9

3. THE APPEALS PRESENT NO SUBSTANTIAL FEDERAL QUESTION SINCE PRIOR DECISIONS OF THIS COURT HAVE CONFIRMED THE AUTHORITY OF THE STATE TO REGULATE AND PROHIBIT UNION SECURITY PROVISIONS IN COLLECTIVE BARGAINING AGREEMENTS 10

4. THE "TWO ELECTION" PROCEDURE FALLS WITHIN THE SCOPE OF AUTHORITY EXTENDED TO THE STATES BY §14(b) OF THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. §164(b), AND THUS RESTS UPON AN ADEQUATE AND INDEPENDENT STATE GROUND 15

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Alabama State Federation of Labor v. McAdory,
325 U.S. 450 (1945) 7

Algoma Plywood and Veneer Company v. Wisconsin
Employment Relations Board,
336 U.S. 301 (1949) 10, 13, 14, 15, 16

Allen-Bradley Local v. Wisconsin Employment
Relations Board,
315 U.S. 740 (1942) 16

Amalgamated Ass'n of St. E.R. & M.C. Emp. v. Lockridge,
403 U.S. 274 (1970) 13

Automobile Workers v. Russell,
356 U.S. 634 (1958) 17

Bethlehem Steel Company v. New York Labor Board,
330 U.S. 767 (1947) 8

California Water Service Company v. City of Redding,
304 U.S. 252 (1938) 10

Electric Bond and Share Company v. S.E.C.,
303 U.S. 419 (1938) 7

Ex Parte Poresky,
290 U.S. 30 (1933) 10

Hagans v. Lavine,
415 U.S. 528 (1974) 10

Hanna Mining Company v. Marine Engineers,
382 U.S. 181 (1965) 17

Herb v. Pitcairn,
324 U.S. 117 (1945) 15, 17

International Union v. Wisconsin Employment
Relations Board,
336 U.S. 245 (1949) 16

LaCrosse Telephone Corporation v. Wisconsin
Employment Relations Board,
336 U.S. 18 (1949) 7

Levering and Garrigues Company v. Morrin,
289 U.S. 103 (1933) 10

Linn v. Plant Guard Workers,
383 U.S. 53 (1966) 17

Machinists v. Gonzales,
356 U.S. 617 (1958) 17

Missouri Pacific Railroad Company v. Castle,
224 U.S. 541 (1912) 10

Molders Union (Malleable Iron Range Company),
150 NLRB 913 (1965) 14

Oil, Chemical and Atomic Workers v. Mobil Oil
Corporation, 96 S.Ct. 2140,
44 U.S.L.W. 4842 (U.S. 1976) 16

Paschall v. Christie-Stewart, Inc.,
414 U.S. 100 (1973) 15

Public Service Company of Utah v. Wycoff,
344 U.S. 237 (1952) 7

Rescue Army v. Municipal Court,
331 U.S. 549 (1947) 7

Retail Clerks Local 1625 v. Schermerhorn,
375 U.S. 96 (1963) 12, 13, 14, 16

San Diego Building Trades Council v. Garmon,
359 U.S. 236 (1959) 9, 17

Western Electric Company,
84 NLRB 1019 (1949) 14

Wheeler v. Barrera,
417 U.S. 402 (1974) 7

Williams v. Georgia,
349 U.S. 374 (1955) 15

Wolfe v. North Carolina,
364 U.S. 177 (1960) 15

Zucht v. King,
260 U.S. 174 (1922) 10

STATUTES

A. National Labor Relations Act, as amended
§8(a) (3); 29 U.S.C. §158(a) (3) 11
§9; 29 U.S.C. §159 ..... 4, 15
§14(b); 29 U.S.C. §164(b) 8, 9, 10, 11, 12, 13, 15, 16, 17

B. Colorado Revised Statutes 1973
C.R.S. 1973, §2-4-201 6
C.R.S. 1973, §8-3-104(4) 4, 15
C.R.S. 1973, §8-3-104(10) 6
C.R.S. 1973, §8-3-108(1)(c) 3
C.R.S. 1973, §8-3-110(1) 3
C.R.S. 1973, §8-3-120 6

OTHER AUTHORITIES

H. Rep. No. 510, 20th Cong., 1st Sess, page 60 12

In the Supreme Court of the United States

Nos. 76-459 and 76-478

COMMUNICATION WORKERS OF AMERICA, AN UNINCORPORATED LABOR ASSOCIATION,

Plaintiff-Appellant,

vs

STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, JAMES M. SHAFFER, EXECUTIVE DIRECTOR, STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, HENRY C. KIMBROUGH, IN HIS CAPACITY AS A MEMBER OF THE INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, ALBERT F. MANGAN, IN HIS CAPACITY AS A MEMBER OF THE INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, AND KENNETH C. RUSSELL IN HIS CAPACITY AS A MEMBER OF THE INDUSTRIAL COMMISSION OF COLORADO,

Defendants–Appellants

vs

WESTERN ELECTRIC COMPANY, INC., a NEW YORK CORPORATION AND THE MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY, A COLORADO CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE SUPREME COURT OF COLORADO

MOTION TO DISMISS OR AFFIRM

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, the Appellee, The Mountain States Telephone and Telegraph Company moves this Court to dismiss the appeals herein or, in the alternative, to affirm the judgment of the Supreme Court of Colorado on the ground that the requested appeals do not present substantial federal questions. The issues presented by the appeals have already been decided by this Court.

INTRODUCTORY STATEMENT

A decision of the Colorado Supreme Court has been separately appealed by two parties. Plaintiff-Appellant Communications Workers of America, hereinafter C. W. A., challenges the totality of the decision. State Agency Defendant-Appellants appeal one procedural aspect of the decision. Different case numbers were assigned to the two appeals. This Motion to Dismiss or Affirm pertains to both appeals.

SUPPLEMENTAL STATEMENT OF THE CASE

Appellee, The Mountain States Telephone and Telegraph Company, adopts in substance the statements of the case found in the jurisdictional statements of both Appellants. A supplemental statement will, in the opinion of the Appellee, nonetheless, clarify the proceedings. The sole issue presented to the Colorado Supreme Court was the validity of union security provisions contained in collective bargaining agreements between Plaintiff C. W. A. and two Defendant employers. The action arose directly from the refusal of the employers to discharge employees who had ceased making payments of union dues, or an amount equivalent to union dues, to local units of C. W. A. in Colorado. The refusal to discharge was premised on the ground that the union security provisions were unenforceable in Colorado since the union had not complied with the referendum requirements of the

Colorado Labor Peace Act, Section 8-3-108(1) (c) (CRS 1973.)[1]

The Colorado Department of Labor and Employment, Division of Labor, the Colorado Industrial Commission, and various officials of these agencies charged with the administration of the Colorado Labor Peace Act were nominal party defendants. These Defendants did not actively participate. Through the Attorney General of the State of Colorado, they indicated that the Colorado courts had concurrent jurisdiction and were free to proceed with a determination without prior exhaustion of administrative remedies pursuant to Section 8-3-110(1) (CRS 1973).[2]

---

[1] 8-3-108(1) (c) (C.R.S. 1973)

> Encourage or discourage membership in any labor organization, employee agency, committee, association, or representation plan by discrimination in regard to hiring, tenure, or other terms or conditions of employment; except that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employees in a collective bargaining unit where three-quarters or more of his employees have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the director. The director shall declare any such all-union agreement terminated whenever he finds that the labor organization involved unreasonably has refused to receive as a member any employee of such employer, and each such all-union agreement is made subject to this duty of the director. Any person interested may come before the director, as provided in section 8-3-110, and ask the performance of this duty.

[2] 8-3-110(1) (C.R.S. 1973)

> Any controversy concerning unfair labor practices may be submitted to the division in the manner and with the effect provided in this article; but nothing in this article shall prevent the pursuit of equitable or legal relief in courts of competent jurisdiction, nor shall it be any ground for refusal of such relief that all of the administrative remedies provided in this article before the division have not been exhausted.

Both Appellants argue that the resulting decision of the Colorado Supreme Court has created irreconcilable conflict with the certifications powers extended to the National Labor Relations Board by Section 9 of the National Labor Relations Act, 29 USC §159. Both Appellants premise their contention on the fact that the Colorado Labor Peace Act was construed by the Colorado Supreme Court to require a determination of a "collective bargaining unit," as defined by Section 8-3-104(4) (CRS 1973),[3] prior to the all-union referendum election. The Colorado Supreme Court, however, specifically and expressly held that the determination of a "collective bargaining unit" was for the purpose of conducting the referendum election and was not certification for the general purposes of collective bargaining. It does not establish a representative bargaining agent for purposes of negotiating wages, hours and terms and conditions of employment. According to the Colorado Supreme Court, this determination constitutes only a procedure in state regulation of union security "severable from its application in other contexts of the Act." *Communications Workers of America vs. Western Electric Company, Inc., et. al.*, 551 P2d 1065, 1079 (Colo. 1976). The Colorado Supreme Court decision does not in any way pertain to the issue of representation as that term is generally understood in labor law. Indeed, the Colorado Supreme Court recognized that its regulatory procedure,

[3] 8-3-104(4) (C.R.S. 1973)

> "Collective bargaining unit" means an organization selected by secret ballot, as provided in section 8-3-107, by a majority vote of the employees of one employer employed within the state who vote at an election for the selection of such unit, except that, where a majority of such employees engaged in a single craft, division, department, or plant have voted by secret ballot that the employees of such single craft, division, department, or plant shall constitute their collective bargaining unit, it shall be so considered. Two or more collective bargaining units may bargain collectively through the same representative or where a majority of the employees in each separate unit have voted to do so by secret ballot, as provided in section 8-3-107.

including the "collective bargaining unit" election and the subsequent all union referendum, would occur only after a union security clause had been actually negotiated by a certified or recognized bargaining representative under federal law. 551 P2d 1065 at 1078.

ARGUMENT IN SUPPORT OF GRANTING THE MOTION TO DISMISS

1. THE QUESTION OF COLORADO'S AUTHORITY TO REGULATE UNION SECURITY BY IMPOSING A "TWO ELECTION" PROCEDURE DOES NOT PRESENT AN ISSUE SUFFICIENTLY "RIPE" FOR REVIEW.

Defendant-Appellant State of Colorado argues that a substantial federal question exists because the Colorado Supreme Court's decision "conflicts with the consistent administrative interpretation which the state has given to the Colorado Labor Peace Act since its inception" (Jurisdictional Statement page 7). Arguing that certification of the state "collective bargaining unit" is inconsistent with the federal regulatory scheme, the state observes that "finally, and most critically, the state will be obligated to conduct elections to redetermine units already recognized or certified by the National Labor Relations Board. This election process will cost the state large sums of money, will create additional administrative burdens, and may invalidate contract provision concerning union security for which a referendum was held, but no Colorado unit election was conducted." (Jurisdictional Statement pages 11 and 12.) Appellee, The Mountain States Telephone and Telegraph Company, respectfully suggests that matters of state expense, and state administrative convenience do not rise to the level of substantial federal questions, and submits that there is nothing in the opinion of the Colorado Supreme Court to suggest that the state must conduct elections to redetermine units already recognized or certified by the National Labor Relations Board. This is totally speculative. The Colorado Labor Peace Act itself defines an "election" to include those conducted "by any tribunal having competent jurisdiction or whose jurisdiction has been

accepted by the parties." Section 8-3-104 (10) (CRS 1973).[4] This certainly contemplates an NLRB election and certification.

The argument of the state appears to be that the state agencies will administer the law so as to bring it into conflict with the federal constitution or an act of Congress. This is not only hypothetical but is specifically at odds with the law of Colorado generally and with specific provisions of the Colorado Labor Peace Act. The Colorado Labor Peace Act specifically provides that where there is a conflict of provisions that "in any situation where the provisions of this Article (Colorado Labor Peace Act) cannot be validly enforced, the provisions of such other statutes or laws shall apply." Section 8-3-120 (CRS 1973).[5] In addition, Section 2-4-201 (CRS 1973)[6] specifically provides that the Colorado

[4] 8-3-104(10) (C.R.S. 1973)

"Election" means a proceeding in which the employees authorized by this article cast a secret ballot to select a collective bargaining unit or for any other purpose specified in this article, including elections conducted by the division of labor or by any tribunal having competent jurisdiction or whose jurisdiction has been accepted by the parties.

[5] 8-3-120 (C.R.S. 1973)

Wherever the application of the provisions of other statutes or laws conflict with the application of the provisions of this article, this article shall prevail; except that, in any situation where the provisions of this article cannot be validly enforced, the provisions of such other statutes or laws shall apply.

[6] 2-4-201 (C.R.S. 1973)

(1) In enacting a statute, it is presumed that:

(a) Compliance with the constitutions of the state of Colorado and the United States is intended;

(b) The entire statute is intended to be effective;

(c) A just and reasonable result is intended;

(d) A result feasible of execution is intended;

(e) Public interest is favored over any private interest.

General Assembly in enacting a statute is to be presumed to have intended "compliance with the constitutions of the State of Colorado and the United States. . ."

It is suggested that the arguments of the State Appellants are hypothetical, do not establish specific legal relationships, and are not presently ripe for review. Absent an assumption that Colorado will administer its law so as to create actual conflict with an Act of Congress, the case presents no specific factual context for evaluating these arguments. This alone should suggest judicial restraint over a constitutional determination of Federal supremacy until actual Federal-State conflict exists. See, for example, *Alabama State Federation of Labor vs. McAdory*, 325 U.S. 450 (1945); *Rescue Army vs. Municipal Court*, 331 U.S. 549 (1947); *Electric Bond and Share Company vs. Securities and Exchange Commission*, 303 U.S. 419 (1938); *Public Service Co. of Utah vs. Wycoff*, 344 U.S. 237 (1952); and *Wheeler vs. Barrera*, 417 U.S. 402 (1974).

Cases relied upon by both Appellants note the impropriety of ruling on an appeal where, as here, additional administrative actions, including the determination of the bargaining unit, holding an election on the union referendum, and potentially an unfair labor practice proceeding with subsequent judicial review, must occur before specific legal rights and relationships of the parties to this action are finally established. In *LaCrosse Telephone Corp. vs. Wisconsin Employment Relations Board*, 336 U.S. 18 (1949), the state agency actually certified a collective bargaining unit to bargain with an employer over wages, hours and terms and conditions of employment. The Wisconsin Supreme Court sustained the state certification as against the argument that it created a conflict with election provisions of the National Labor Relations Act. Unlike the present situation, the state certified union in the *LaCrosse* case was certified to bargain for purposes of wages, hours and terms of conditions of employment. In addition, unlike the present case, the State Court decision was final with respect to the specific legal relationship between the employer and its union and no additional administrative steps were necessary. And finally, unlike the

present situation, there was no specific statutory grant of authority to the State whereas, in the present situation, §14(b) of the National Labor Relations Act, 29 U.S.C., §164(b), has ceded to the states the authority to regulate union security. As to the need for this "conclusive" determination of rights as opposed to an "abstract determination of status," the Court noted that an interim adjudication in an uncompleted administrative process which did not establish legal rights and relationships would result in a case which was "not ripe for the intervention of the Federal judicial power" *Id.* at 21. The other case relied upon by Appellants, *Bethlehem Steel Company vs. New York State Labor Relations Board*, 330 U.S. 767 (1947), involved the constitutionality of a State act which purported to allow unionization of supervisors. The case preceded the Taft-Hartley amendments concerning non-recognition of supervisory units. The New York State Court upheld the constitutionality of its act based upon the assumption that Federal law is not exclusive until the power is actually exercised. This Court noted that the Congressional intent to exclude state action could be implied from the pervasive nature of Federal labor legislation. The cast is distinguishable in two respects. First, unlike the situation in *Bethlehem Steel*, Congress has specifically provided the states authority to regulate union security through 14(b) of the National Labor Relations Act, 29 U.S.C. §164(b). Secondly, unlike the *Bethlehem Steel* case, the situations presented to the Court had not previously been litigated; whereas, in the present case, this Court has spoken at great length to the very issues raised by Appellants.

The Plaintiff-Appellant C.W.A. argues that the Colorado Supreme Court decision raises a substantial Federal question concerning the scope of §14(b) of the National Labor Relations Act, 29 U.S.C. §164(b). Their argument is that "the Colorado Supreme Court's decision herein constitutes a far broader construction of §14(b) than accorded under any decision of this Court interpreting such provision" (Jurisdictional Statements at 23). Although not specifically so subdivided, the argument appears to be that §14(b) of the National Labor Relations Act, 29 U.S.C. §164(b), does not permit a state to *REGULATE* union security but only to

"absolutely prescribe such provisions" (Jurisdictional Statement at 34).

Secondly, C.W.A. appears to argue that the Colorado Supreme Court's interpretation of §14(b) of the National Labor Relations Act, 29 U.S.C. §164(b), raises the question of whether a state may regulate the negotiation of a union security clause (Jurisdictional Statement at 29). And finally, C.W.A. appears to argue that Congress did not intend §14(b) to have application to "employers and labor organizations in interstate commerce" (Jurisdictional Statement at page 3).

The Appellee, The Mountain States Telephone and Telegraph Company, respectfully submits that all of these issues have been previously decided by this Court.

2. THE APPEALS PRESENT NO SUBSTANTIAL FEDERAL QUESTION SINCE THIS COURT HAS PREVIOUSLY DETERMINED THAT §14(b) OF THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. §164(b), MAY BE APPLIED TO EMPLOYERS ENGAGED IN INDUSTRIES AFFECTING COMMERCE.

It is settled beyond all rational argument to the contrary that Federal law controls the vast majority of employer-employee relationships. Absent a specific grant of authority by Congress, states may not apply their statutes to the labor-management activities of any business enterprise in or affecting interstate commerce. It is equally clear that a potential for conflict is adequate to bring the doctrines of preemption into play. See *San Diego Building Trades Council vs. Garmon*, 359 U.S. 236 (1959). Nonetheless if Plaintiff-Appellant's argument that §14(b) cannot constitutionally be applied to any employer whose activity affects commerce, the provision has no meaning. It is a nullity and Congress wasted its time and effort in its enactment. If §14(b) has any meaning whatsoever, it has to be that the state law may be extended in this one area to employers whose operations affect commerce.

3. THE APPEALS PRESENT NO SUBSTANTIAL FEDERAL QUESTION SINCE PRIOR DECISIONS OF THIS COURT HAVE CONFIRMED THE AUTHORITY OF THE STATE TO REGULATE AND PROHIBIT UNION SECURITY PROVISIONS IN COLLECTIVE BARGAINING AGREEMENTS.

The appellate jurisdiction of this Court cannot be invoked by raising an issue which has been conclusively foreclosed by prior Supreme Court decisions. *Zucht vs. King*, 260 U.S. 174 (1922); *Levering and Garrigues Company vs. Morrin*, 289 U.S. 103 (1933); *California Water Service Company vs. City of Redding*, 304 U.S. 252 (1938); *Ex parte Poresky*, 290 U.S. 30 (1933); and *Missouri Pacific Railroad Company vs. Castle*, 224 U.S. 541 (1912). The principle was recently reaffirmed in *Hagans vs. Lavine*, 415 U.S. 528 (1974), where the court noted:

> "[t]he question may be plainly unsubstantial, either because it is 'obviously without merit' *or because 'its soundness so clearly results from the previous decisions of this court as to foreclose the subject* and leave no room for the inference that the question sought to be raised can be the subject of controversy.'" (emphasis supplied).
> 415 U.S. at 537.

Such issues do not raise substantial Federal questions, and accordingly constitute a sufficient basis for the Court to dismiss the appeal, or affirm the decision below without further argument, as authorized by Rule 16(1)(b), Revised Rules of the United States Supreme Court.

The specific issue of state authority to regulate, as opposed to an absolute prohibition of union security devices pursuant to the authorization of §14(b) of the National Labor Relations Act, 29 U.S.C. §164(b), was conclusively resolved in *Algoma Plywood and Veneer Company vs. Wisconsin Employment Relations Board*, 336 U.S. 301 (1949). As in Colorado, the Wisconsin statute did not prohibit union security clauses but rather regulated such clauses as

"all-union" agreements applicable to all employees of the employer *if* affirmatively sanctioned by three-quarters of such employees in a state-conducted referendum. The contract provision in question was a maintenance of membership clause under which an employee was dismissed for failure to pay dues. Initially, the United States Supreme Court held that there was no preemption of state activity by virtue of §8(3), 29 U.S.C. §158(3) of the original Wagner Act and rejected the employer's contention that Wisconsin could not forbid what federal law affirmatively allowed. This Court stated:

> "The short answer is that §8(3) merely disclaims a national policy hostile to the closed shop *or* other forms of union-security agreement." *Id.* at 307

Addressing itself then to the changes wrought by the Taft-Hartley amendments, this Court concluded that:

> "Other provisions of the Taft-Hartley Act make it even clearer than the National Labor Relations Act that the States are left free to pursue their own more restrictive policies in the matter of union-security agreements. Because §8(3) of the new Act forbids the closed shop and strictly regulates the conditions under which a union-shop agreement may be entered, §14(b) was included to forestall the inference that federal policy was to be exclusive. *Id.* at 313-314.

Citing legislative history at length, this Court further disposed of the argument that §14(b) preempts state law which "regulates" but does not wholly "prohibit" union security agreements. It disposed of this argument by saying that any limitation on the "application" of union security agreements was proper by a state under §14(b).

> *It is argued, however, that the effect of this section is to displace State law which "regulates" but does not wholly "prohibit" agreements requiring membership in a labor organization as a condition of employment.* But if there could be any doubt that the language of the

section means that the Act shall not be construed to authorize any "application" of a union-security contract, such as discharging an employee, *which under the circumstances "is prohibited" by - the state,* the legislative history of the section would dispel it. *See* S. Rep. No. 105, 80th Cong. 1st Sess. 5-7; H. Rep. No. 245, 80th Cong. 1st Sess. 9, 34, 40, 44; H.R. Conf. Rep. No. 510, 80th Cong. 1st Sess. 60; 93rd Cong. Rec. 3554, 3559, 4904, 6383-84, 3617-18; HR 3020, as reported, §13. (emphasis supplied).
336 U.S. at 313.

The following quote from the House Conference Report on §14(b) shows what Congress intended.

> "the United States expressly declares the subject of compulsory unionism one that States may regulate concurrently with the United States, notwithstanding that the State law limits compulsory unionism more drastically than does the Federal law." H. Rep. No. 510, 80th Cong., 1st. Sess., p. 60.

The Rule was reaffirmed *Retail Clerks Inter. Ass'n. vs. Schermerhorn,* 375 U.S. 96 (1963). This Court held that state courts rather than the NLRB had jurisdiction to enforce the straight prohibition against the "actual negotiation and execution of the type of agreement described by Sec. 14(b)." *Id.* at 105. The court's rationale is clear and succinct:

> "Yet even if the union security agreement clears all federal hurdles, the state by reason of §14(b) have the final say and may outlaw it.
>
> There is thus conflict between state and federal law; but it is a conflict sanctioned by Congress with directions to give the right of way to state laws barring the execution and enforcement of union-security agreements." *Id.* at 102, 103.

This Court's final observation was that Congress "chose to abandon any search for uniformity in dealing with the problems of state laws barring the execution and application of

agreements authorized by §14(b) and decided to suffer a medley of attitudes and philosophies on the subject." *Id.* at 104, 105.

The vitality and viability of §14(b) and other exemptions to federal preemption is dramatized by reference to *Amalgamated Ass'n. of St. E.R. & M.C. Emp. vs. Lockridge,* 403 U.S. 274 (1970) which contains the following discussion of the myriad exemptions to preemption:

> "Even though federal law is pervasive in labor-management relations, state law is preserved in some respects .... the simple fact that Congress and this Court have deferred to the States in these areas indicates a subordination of the interest in uniformity to the interests of the States. By making the matter one of the state law, Congress has not only authorized multiformity on the subject, but practically guaranteed it. The results, as far as uniformity is concerned, are no different than if the States applied federal law with abandon. For example, the controversial §14(b) of NLRA, has authorized States to choose for themselves whether to require or permit union shops. This allows the state to *regulate* union or agency shop clauses, [citations omitted] so that union insistence on a security agreement as part of a collective bargaining agreement may be prohibited in one State and protected or even encouraged in another. The policy choice made by Congress on this matter necessarily subordinated uniformity in national law to what were perceived to be overriding concerns of the States." *Id.* at 317, 318. [citations omitted and emphasis added]

While this quote is from a dissent, it should be noted that it was essentially the opinion of four Justices.

The Colorado Supreme Court found this Court's decisions in *Algoma* and *Schermerhorn* to be controlling. Citing these decisions the Colorado Court noted:

> C.W.A. contends that states, pursuant to §14(b), are allowed to "prohibit" but not to "regulate" union

> security agreements. No matter how this distinction may be interpreted, §14(b) does allow states to prohibit the "application" of union security agreements. .... The provisions of Section 80-4-6(1)(d) are an important incident of the state's power to prohibit the application of union security provisions such as the ones here in issue. That power has not been supplanted by federal law.
> 551 P.2d at 1079

In spite of the discussions in *Algoma* and *Schermerhorn*, and the Colorado Supreme Court's reliance upon them, CWA continues to urge that the issue remains unresolved, arguing some conflict with decisions of the National Labor Relations Board (NLRB). (CWA Jurisdictional Statement at 33-34) However, the Board's decision in *Western Electric*, 84 NLRB 1019 (1949), and *Molders Union* (Malleable Iron Range Company), 150 NLRB 913 (1965), demonstrate that the Board both recognizes and adheres to the principles of *Algoma*. In *Western Electric*, the Board noted that:

> "Contrary to the views of our dissenting colleagues, in our opinion, this result is not inconsistent with the recent case of Algoma Plywood Co. vs. Wisconsin Employment Relations Board, 69 S. Ct. [584], 1949 [16 LABOR CASES ¶65,013], where the Supreme Court held that the laws of Wisconsin regulating union security agreements had not been superseded by the National Labor Relations Act, as amended. *There is no necessary conflict, in our opinion, between that holding and the view which we adopt herein that the States and the Federal Government have concurrent jurisdiction to regulate the union shop, each being supreme in its own sphere.*
>
> *"It follows from this view that any certification which we may issue on the basis of the election directed below is to be construed as certifying only that federal requirements have been met by the Petitioner with State Laws regulating the union shop is a question of State law to be determined by State authorities in a State proceeding."* (emphasis supplied)
> *Western Electric* at 1020.

It is respectfully suggested that Plaintiff-Appellant's reliance on any Administrative Agency decisions at odds with a decision of this Court is misplaced.

4. THE "TWO ELECTION" PROCEDURE FALLS WITHIN THE SCOPE OF AUTHORITY EXTENDED TO THE STATES BY §14(b) OF THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. §164(b), AND THUS RESTS UPON AN ADEQUATE AND INDEPENDENT STATE GROUND.

Both Appellants challenge the validity of the "two election" procedure mandated by the Colorado Supreme Court's interpretation of the Colorado Labor Peace Act. This attack is on the basis that §9 of the Labor Management Relations Act has preempted state authority to conduct the initial "collective bargaining unit" election required by §8-3-104(4) (CRS 1973). (CWA Jurisdictional Statement at 28-33, Colorado Department of Labor Jurisdictional Statement at 7-12). To the contrary, the Colorado procedure falls well within the scope of §14(b), 29 U.S.C. §164(b), and therefore constitutes a valid exercise of state power raising no substantial Federal question since it rests upon adequate and independent state grounds.

Herb vs. Pitcairn, 324 U.S. 117 (1945); *Williams vs. Georgia*, 349 U.S. 374 (1955); *Wolfe vs. North Carolina*, 364 U.S. 177 (1960); and *Paschall vs. Christie-Stewart, Inc.*, 414 U.S. 100 (1973).

This Court in *Algoma, supra*, recognized that the enactment of §14(b), 29 U.S.C. §164(b), was intended "to forestall the inference that Federal policy was exclusive in the matter of union security." 336 U.S. at 314. Within the framework of union security, the states are free to pursue their own policies even though they are more restrictive than that embodied in the Federal legislation. Though Appellants would attempt to expand the extent of the Colorado Supreme Court's holding so as to actually bring it in conflict with the NLRB's certification functions under §9 of the LMRA, 29

U.S.C. §159, the Court's requirement of a state conducted "collective bargaining unit" election was expressly limited to purposes of effecting the state regulation of union security devices, and was not in the nature of state certification for general purposes of collective bargaining. The Colorado Supreme Court noted:

> We need not speculate on the question of whether Colorado's procedures for establishing a collective bargaining unit are preempted by federal law in any context other than the one here in issue. We concern ourselves with the certification procedure only as it relates to the state's power to regulate union security clauses in collective bargaining agreements. 551 P.2d at 1078.

Algoma and *Schermerhorn* established the validity of state regulation, and the Colorado requirement for an initial state certification of a unit, solely for the purpose of conducting the all-union referendum, does not have the effect of removing the procedure from the scope of §14(b), 29 U.S.C. §164(b). The authorities cited by Appellant do not invalidate such regulation. The Colorado Supreme Court recognized the restrictions of these decisions, and framed its opinion within these guidelines. Colorado is not attempting to certify for general purposes of representation, but only for purposes of negotiation of union security provisions, 551 P.2d at 1078. The Colorado procedure is directly analogous to state activities upheld under §14(b), 29 U.S.C. §164(b), such as in *Algoma* and *Schermerhorn, supra,* and other areas where the NLRB's jurisdiction has not been found to be exclusive. *See, Allen-Bradley Local vs. Wisconsin Employment Relations Board,* 315 U.S. 740 (1942); *International Union vs. Wisconsin Employment Relations Board,* 336 U.S. 245 (1949).

This Court's recent decision in *Oil, Chemical and Atomic Workers vs. Mobil Oil Corporation,* 96 S. Ct. 2140, 44 U.S.L.W. 4842 (U.S. 1976), supports the Appellees understanding of the scope of §14(b), 29 U.S.C. §164(b):

> Since §8(a) (3) already prohibits the closed shop, the more restrictive policies that §14(b) allows the States to enact relate not to the hiring process but rather to conditions that would come into effect only after an individual is hired. It is evident, then, that §14(b)'s primary concern is with state regulation of the post-hiring employer-employee-union relationship. . . . We have recognized that with respect to those state laws which §14(b) permits to be exempted from §8(a) (3)'s national policy "[t]here is . . . conflict between state and federal law; but it is a conflict sanctioned by Congress with directions to give the right of way to state laws. . ." Retail Clerks vs. Schermerhorn, 375 U.S. 96, 103 (1963). The question here of course is whether Texas' contacts with this employment relationship are adequate to call into play §14(b)'s mandated deference to state law.
> 44 USLW at 4845, 96 S. Ct. at 2146

This Court also noted in *San Diego Unions vs. Garmon,* 359 U.S. 236 (1959), that the Congress did not withdraw from the state "power to regulate where the activity regulated [is] a merely peripheral concern of the Labor Management Relations Act." 359 U.S. at 243. This Court has also upheld the state's power to act, even where state authorization was not as expressly recognized by Congress. *See, Automobile Workers vs. Russell,* 356 U.S. 634 (1958); *Machinists vs. Gonzales,* 356 U.S. 617 (1958); *Hanna Mining Company vs. Marine Engineers,* 382 U.S. 181 (1965); *Linn vs. Plant Guard Workers,* 383 U.S. 53 (1966). The state activity embodied in the Colorado "two election procedure," is incident to authority expressly granted to the state under §14(b), 29 U.S.C. §164(b). As such, the decision rests upon an adequate and independent state ground. As stated in *Herb vs. Pitcairn,* 324 U.S. 117 (1945) the

> "Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds."
> *Id.* at 125.

Accordingly, this issue, as raised by both Appellants, fails to raise a Federal question of a substantial nature, and does not warrant the exercise of this Court's appellate jurisdiction.

CONCLUSION

WHEREFORE, Appellee, The Mountain States Telephone and Telegraph Company, respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the Judgment entered by the Supreme Court of Colorado.

Respectfully Submitted,

David R. Hansen
Attorney for Defendant-Appellee
The Mountain States Telephone
and Telegraph Company
931 - 14th Street
Room 1300
Denver, Colorado 80202
Telephone: 624-4169

CERTIFICATE OF MAILING

I hereby certify that on this 30th day of November, 1976, three (3) copies each of the foregoing Motion to Dismiss or Affirm of the Defendant-Appellee, The Mountain States Telephone and Telegraph Company, were deposited in the United States Mail, postage prepaid, addressed as follows:

John W. McKendree, Esq.
Law Offices of John W. McKendree
1050 - 17th Street
Suite 1818
Denver, Colorado 80202

Carl F. Eiberger, Esq.
DeMuth & Eiberger
1600 Western Federal Savings Bldg.
Denver, Colorado 80202

John Kezer, Esq.
Assistant Attorney General
1525 Sherman Street
Denver, Colorado 80203

David R. Gorsuch, Esq.
Gorsuch, Kirgis, Campbell, Walker and Grover
1900 Security Life Bldg.
Denver, Colorado 80202

Rex H. Reed, Esq.
The National Right to Work
Legal Defense Foundation, Inc.
8316 Arlington Blvd.
Fairfax, Virginia 22030

John A. Criswell, Esq.
Criswell & Patterson
3780 S. Broadway
Englewood, Colorado 80110

Walter C. Brauer III, Esq.
Mark N. Simons, Esq.
2422 Prudential Plaza
Denver, Colorado 80202

Jean Skinner